No. 87-1034

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Petitioner,

—v.—

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD. IN OPPOSITION

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QUESTION PRESENTED

Should confirmation of a foreign arbitral award be refused under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards because one party to the arbitration proceedings procures from its own local court, rather than from a court of competent jurisdiction in the territory of the arbitration, an ex parte judgment that purports to nullify the arbitration proceedings?

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BRIEF FOR AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD. IN OPPOSITION

Petitioner Mechanised Construction of Pakistan, Ltd. ("MCP") seeks review of a decision by the United States Court of Appeals for the Second Circuit which affirmed the district court's opinion and order confirming a foreign arbitral award rendered in Switzerland in favor of respondent American Construction Machinery & Equipment Corporation, Ltd. ("ACME")[1] pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C.A. § 201 note (West Supp. 1987) (the "Convention"). ACME opposes the issuance of a writ of certiorari to

1 ACME has no parent companies, subsidiaries or affiliates.

review the decisions of the district court and the court of appeals because the decisions below were clearly correct, and petitioner's meritless allegations of public policy considerations provide no basis under U.S. law for U.S. courts to refuse to comply with this Nation's treaty obligation to confirm validly rendered foreign arbitral awards.

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is unreported. The opinion of the District Court for the Southern District of New York (Pet. A3-A19) is reported at 659 F. Supp. 426.

JURISDICTION

The alleged jurisdictional requisites are set forth in the petition at page 2.

TREATY AND STATUTES INVOLVED

1. The pertinent provisions of Article V of the Convention are set forth in the petition at pages 3-4. Article I(1) of the Convention provides:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The pertinent provisions of the United States Arbitration Act ("USAA"), 9 U.S.C. § 1 *et seq.*, are Section 201, which is

set forth in the petition at page 3, and Section 207, which provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

STATEMENT OF THE CASE

In January 1977, ACME, a Cayman Islands corporation with its principal place of business in New York, and petitioner MCP, a state-owned instrumentality of the Government of Pakistan, entered into an agreement whereunder ACME was employed as a purchasing and supply agent for procurement of goods and services for use by petitioner in connection with construction projects in Iraq (the "1977 Agreement"). Pet. A4, A82-A86. The parties expressly agreed in Paragraph 9 of the Agreement that any disputes between them were to be resolved by arbitration:

> *Arbitration* Any dispute or difference arising between the parties concerning the interpretation of any provision of this agreement or performance or any action taken there-under shall be settled in the first instance directly between the parties and if no such settlement is possible by referring to the International Chamber of Commerce at Paris/Geneva for arbitration. (Pet. A5, A85.)

The 1977 Agreement, which was signed by both parties in Baghdad, Iraq (Pet. A72), did not contain a governing law provision. In 1978, the parties subsequently entered into a supplementary agreement (the "1978 Supplementary Agreement") (Pet. A72-A81) which MCP exacted from ACME

under economic duress (Pet. A40). This agreement provided in clause 12 that both the 1977 Agreement and the 1978 Supplementary Agreement were to be governed by the law of Pakistan. Pet. A5, A80.

Because petitioner did not make payment as promised (A40), ACME filed a request for arbitration with the International Chamber of Commerce (ICC) on May 1, 1979 pursuant to the 1977 Agreement. Pet. A5. Petitioner thereafter participated in the arbitration proceedings for well over a year without raising any objections to the ICC's jurisdiction. First, on June 24, 1979, petitioner filed with the ICC both a reply and a counterclaim of $1 million. Pet. A5. Second, MCP confirmed acceptance of the 1977 arbitration clause and consented to have the ICC Court of Arbitration select the arbitrator. Pet. A14, A27-28. Third, after the ICC Court of Arbitration selected Geneva as the locale of the arbitration (Pet. A32) and appointed a sole arbitrator in September 1979 (Pet. A5-A6, A25), petitioner designated an authorized representative who, on March 19, 1980, signed the Terms of Reference describing the scope of the arbitration and the issues to be decided (Pet. A6, A21-A25).

Under the Terms of Reference, "the jurisdiction of the Arbitrator to determine finally the issues referred to in these Terms of Reference was accepted on behalf of the parties." Pet. A28. MCP specifically agreed to arbitrate the issue of the validity of the 1978 Supplementary Agreement. Pet. A6. The Terms of Reference stated in pertinent part:

> The issues to be determined in this arbitration are:
>
> > What compensation (if any) is due or will become due by the Respondent to the Claimant under the Agreement of 6th January 1977 as validly affected (if at all) by the Agreement of 22nd May 1978, and on what terms of payment?

Pet. A24. Petitioner further agreed in the Terms of Reference to Geneva as the place of arbitration (Pet A32-A33) and the use of the procedural rules of Geneva. Pet. A14-A15.

On July 29, 1980, more than thirteen months after first participating in the arbitration and after the arbitrator had set a hearing date, petitioner alleged for the first time that the arbitration agreement and the arbitration proceedings were invalid under the law of Pakistan. Pet. A25-A26. Only after having expressly consented in the Terms of Reference to the arbitrator's jurisdiction did MCP, a Pakistani entity, petition a local court in Lahore, Pakistan for a declaration invalidating both the arbitration agreement and the arbitration proceedings. Pet. A7, A27. MCP's petition, which the arbitrator found to be "extremely misleading" due to "omissions and positive misstatements" concerning petitioner's prior participation in the arbitration (*id.*), was granted in January 1981 after proceedings in which neither ACME nor the arbitrator appeared. Pet. A7, A27-28. The arbitration hearings took place in Geneva on June 1 and 2, 1981 without the attendance of MCP, which had been given proper notice of the hearing date but chose not to appear. Pet. A6, A33.

In the award rendered on May 24, 1982 (the "Award"), the arbitrator determined that the 1978 Supplementary Agreement, including the Pakistani governing law provision, was invalid under both Pakistani and New York law on the grounds of economic duress and lack of consideration (Pet. A39-A40), and that New York law governed the 1977 Agreement (Pet. A8, A45). The arbitrator further found that even if Pakistani law were applicable, MCP's objections to his jurisdiction were without merit. Pet. A8, A32. The arbitrator decided in favor of ACME on its claim, and dismissed MCP's counterclaim. Pet. A7. MCP did not appeal the Award to any Swiss court.

On May 17, 1985, ACME filed a petition in the district court below to confirm the Award pursuant to 9 U.S.C. § 207. Pet. A8. MCP first moved to dismiss ACME's petition on the grounds, *inter alia*, of lack of jurisdiction. The district court denied MCP's motion on all grounds in its Opinion and Order dated February 28, 1986 (the "February 1986 Opinion"), which petitioner did not appeal. Resp. 1a-11a. The district court subsequently issued its decision dated March 23, 1987 confirm-

ing the Award (Pet. A3-A19), and on April 6, 1987 entered judgment in the amount of $2,793,962.39 in favor of ACME. Resp. 12a-13a. The court of appeals heard argument on petitioner's appeal from the judgment on September 2, 1987, and unanimously affirmed the district court's decision in a per curiam opinion on September 14, 1987. Pet. A1-A2.

REASONS FOR DENYING THE WRIT

REVIEW IS NOT WARRANTED BECAUSE THE COURTS BELOW ACTED IN ACCORDANCE WITH THE TREATY OBLIGATION OF THE UNITED STATES TO RECOGNIZE FOREIGN ARBITRAL AWARDS

This case involves the U.S. treaty obligation to enforce a foreign arbitral award that petitioner concedes falls under the Convention, a global multilateral treaty ratified by over 70 countries which requires contracting states to recognize arbitral awards rendered in the territory of other contracting states such as Switzerland, where the Award was rendered. This Court has stated:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). In order to facilitate the enforcement of arbitral awards, Article V of the Convention provides that recognition of awards may be refused only in certain prescribed situations, and the Congressional legislation implementing the Convention and codified in Chapter 2 of the USAA (9 U.S.C. §§ 201-208) mandates that a U.S. court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

Id. § 207. Here, the district court confirmed the Award because it correctly determined that none of the Article V grounds raised by petitioner to deny recognition existed.

Petitioner does not claim that any conflict among the courts of the United States in the interpretation and construction of Article V justifies the Court's review of this case. Indeed, MCP admits that "there exists a long standing tradition of courts since the enactment of the" USAA "to overturn arbitration awards subsequently issued in only extremely limited circumstances." Pet. 22. Uniform judicial recognition of the "general pro-enforcement bias" underlying the Convention has led the courts to construe the Article V defenses narrowly, because "a narrow construction would comport with the enforcement-facilitating thrust of the Convention." *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973, 976 (2d Cir. 1974). Further, the U.S. judiciary has acknowledged that "the burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award. . . ." *La Societe Nationale v. Shaheen Natural Resources Co.*, 585 F. Supp. 57, 61 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2d Cir.), *cert. denied*, 469 U.S. 883 (1984); *accord Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976). Accordingly, the decisions below did not, contrary to petitioner's contention, create a precedent that would "subject" the Article V defenses to recognition "to an unduly burdensome restrictive interpretation." Pet. 13. The courts below merely applied well-established legal principles in accordance with the purpose and language of both the Convention and the USAA.

Moreover, the district court's rejection of MCP's Article V defenses was totally justified on the merits. Petitioner argues that under Article V(1)(a) "the [arbitration] agreement is not valid under the law to which the parties have subjected it" because MCP obtained, after having first expressly accepted the arbitrator's jurisdiction, an ex parte Pakistani court judgment declaring the 1977 Agreement's arbitration clause invalid

under Pakistani law. Pet. 23-26. The arbitrator expressly found, however, that the 1978 Supplementary Agreement, including the Pakistani governing law provision, was invalid due to economic coercion and lack of consideration (Pet. A39-A40), and that New York law governed the 1977 Agreement. Pet. A8, A45. The district court therefore properly rejected MCP's Article V(1)(a) defense because to transform Pakistani law into "the law to which the parties have subjected" their arbitration agreement would have required the court to reverse the arbitrator's express findings of law, in violation of the settled rule that neither Article V(1)(a) nor the other Convention defenses can be invoked "as a license to review the record of arbitral proceedings for errors of fact or law—a role which we have emphatically declined to assume in the past and reject once again." *Parsons & Whittemore*, 508 F.2d at 977; *see* Pet. A12. The determination of the courts below that the arbitrator's findings were binding is plainly correct. *See Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1268-69 (9th Cir. 1987); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978) ("When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result.").[2]

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2 Petitioner's reliance (Pet. 11, 24-25) on the legal conclusions in the June 2, 1986 affidavit of a Pakistani attorney (Pet. A65-A71), who challenges the correctness of the arbitrator's findings as to the validity of the 1977 arbitration agreement under Pakistani law, is therefore misguided. The courts below correctly rejected MCP's endeavor to challenge the Award through legal arguments which petitioner could have properly presented, but chose not to present, to the arbitrator. Moreover, the affidavit, at most, alleges that the arbitrator erred in his understanding of applicable Pakistani law in connection with the validity of the 1977 arbitration clause. Even if the arbitrator had erred, however, his findings would be non-reviewable in U.S. courts. *Parsons & Whittemore*, 508 F.2d at 977. Interestingly, the affidavit does not dispute the arbitrator's findings of law as to the invalidity under Pakistani law of the 1978 Supplementary Agreement, which contained the Pakistani governing law provision, on the grounds of economic coercion and lack of consideration.

The two other Article V(1) defenses cited in the petition are similarly devoid of merit. MCP's claim (Pet. 27) that the Award "contains decisions on matters beyond the scope of the submission to arbitration" under Article V(1)(c) is erroneous because, as the district court held, "there is no doubt that MCP consented to arbitration of the matters ultimately decided by the Arbitrator" when it "signed the Terms of Reference which set forth the issues to be arbitrated." Pet. A13-A14. Finally, MCP's assertion (Pet. 26-27) under Article V(1)(e) that the Award "has been set aside or suspended by a competent authority of the country . . . under the law of which that award was made" mistakenly relies on the ex parte Pakistani court judgment to show that the arbitration proceedings in which both petitioner and ACME had participated were invalid. The courts below correctly held that the only competent national authority that could have set aside or suspended the Award was Swiss, because the Award—as expressly agreed to by MCP in the Terms of Reference—was rendered in Geneva pursuant to the procedural law of Geneva. Pet. A15.

Apparently aware that neither the Convention nor the legislation implementing it nor the U.S. jurisprudence construing it affords any grounds for denying recognition to the Award, petitioner alleges that "important public policy considerations," "dramatic political repercussions" and "foreign policy ramifications" (Pet. 14, 15) nonetheless warrant review of the decisions below. MCP conjures these phantoms by implying that the "unique fact pattern" of its status as a state-owned instrumentality of Pakistan, a country that is not a Convention signatory, somehow justifies U.S. judicial deference to an ex parte Pakistani court judgment, which MCP procured in order to nullify the very arbitration proceedings in which it had participated. *See* Pet. 15, 23, 31, 33. All of petitioner's arguments in support of this flawed proposition ignore the interwoven treaty, statutory and jurisprudential framework which requires the enforcement of both the Award and the international arbitration agreement into which MCP freely entered.

The basic premise of petitioner's reasons for seeking review—that this case allegedly involves "a question of first impression" because "it shall have the effect of according to foreign arbitral awards, demonstrably improperly obtained, a greater degree of enforceability and effect than judgments of courts of foreign states" (Pet. 12-13)—is misconceived for at least two reasons. First, MCP's contention that the Award was improperly obtained turns the facts of this case upside down: it was the Pakistani court proceedings which the arbitrator found to be marked by MCP's "omissions and positive misstatements." Pet. A7, A27. Second, and more importantly, petitioner's assertion that the decisions below were novel is simply wrong. The principal purpose and effect of the Convention, as the courts below recognized, is precisely to give foreign arbitral awards a greater degree of enforceability and thereby promote the use of arbitration. *See Scherk*, 417 U.S. at 520 n.15. Arbitral awards such as the one here are intended to be more easily enforceable in the United States than foreign court judgments which the United States is not bound to enforce under treaty obligations. Since the United States acceded to the Convention in 1970, U.S. courts have consistently confirmed foreign arbitral awards and this Court has consistently upheld the enforceability of international arbitration agreements, *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims arbitrable under international arbitration agreement); *Scherk*, *supra* (federal securities law claims arbitrable).

MCP's further contention (Pet. 14) that recognition of the Award infringes upon its rights as a Pakistani government-owned instrumentality as defined in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602-1611, is equally specious. The FSIA, which provides foreign states and their instrumentalities with immunity from suit in U.S. courts if none of the specified exceptions to immunity exists, did not insulate MCP from the jurisdiction of the courts below. The district court specifically rejected in the February 1986 Opinion petitioner's contention that it was entitled to immunity under

the FSIA (Resp. 4a-7a, 9a), and MCP never appealed that decision. Further, because MCP's activities in the United States in connection with the 1977 Agreement were purely commercial in nature (Resp. 6a-7a), its status as a state-owned instrumentality is no bar to award enforcement proceedings under U.S. law. *See* 9 U.S.C. § 202 ("arbitral award arising out of a legal relationship . . . which is considered as commercial . . . falls under the Convention").

Petitioner's repeated references (Pet. 15, 31, 32) to the fact that Pakistan is not a party to the Convention are irrelevant to the issue of the Award's confirmation. The Convention unambiguously provides in Article I(1) that it applies to arbitral awards rendered, as here, in the "territory of a State other than the State where the recognition and enforcement of such awards are sought", regardless of whether the governments of the parties to the arbitration agreement are contracting states. *La Societe Nationale*, 585 F. Supp. at 64. Indeed, MCP did not appeal the district court's rejection in the February 1986 Opinion of MCP's contention that confirmation proceedings were inappropriate because MCP is an instrumentality of a Convention non-signatory. Resp. 7a-8a. Furthermore, MCP's assertion (Pet. 31) that confirmation of the Award against it "create[s] an apparent equitable, if not legal, anomaly" is unfounded. U.S. courts have consistently confirmed awards in favor of foreign states and instrumentalities of foreign states which have not acceded to the Convention. *E.g.*, *Imperial Ethiopian Gov't*, *supra*; *La Societe Nationale*, *supra*. When, as here, a foreign state instrumentality has expressly consented to arbitration in the territory of a Convention signatory, it would be truly anomalous if that entity could employ the Convention as a shield to seek denial of recognition of an award against it. *See* Resp. 8a.

MCP also mistakenly relies on Article V(2)(b) of the Convention, which permits non-recognition of an award when such recognition "would be contrary to the public policy of the [forum] country." *See* Pet. 28. It is well-recognized under U.S. law that "[e]nforcement of foreign arbitral awards may be

denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons & Whittemore*, 508 F.2d at 976; *see Northrop Corp.*, 811 F.2d at 1271 (public policy must be "well defined and dominant"). The courts below correctly rejected petitioner's contention that the ex parte Pakistani judgment procured by MCP implicated a U.S. public policy interest contrary to the Award's enforcement.

Indeed, in *Scherk v. Alberto-Culver Co.*, *supra*, this Court deplored, as destructive of the process of international dispute resolution, the actions of parties such as MCP in resorting to their national courts to petition for release from their contractual obligation to arbitrate:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement . . . would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

417 U.S. at 516-17. Accordingly, the district court correctly determined that U.S. "public policy would be violated if the Court declined to confirm the award," because MCP had procured a local ex parte judgment in an attempt to circumvent international arbitration proceedings to which petitioner had agreed, and in which it had participated. Pet. A16-A17.

U.S. public policy, as the courts below recognized, requires deference to arbitral awards which the United States is committed by treaty to enforce when rendered in the territory of Convention signatories such as Switzerland. This Court has stated that "concerns of international comity [and] respect for the capacities of foreign and transnational tribunals . . . require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp.*, 473 U.S. at 629.[3] These concerns are equally applicable to the enforcement of Convention awards.

The decisions of the courts below to confirm the Award are fully consistent with U.S. law and this Nation's treaty obligation under the Convention to recognize validly rendered foreign arbitral awards. Review of the judgment in favor of ACME is therefore not warranted.

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3 Petitioner's continued reliance (Pet. 34-35) on *Wilko v. Swan*, 346 U.S. 427 (1953), is mystifying. The district court below noted that MCP's reliance on *Wilko* (which held that claims arising under the Securities Act of 1933 were non-arbitrable in domestic arbitration cases) is completely misplaced because this Court held in *Scherk* and *Mitsubishi Motors* that federal statutory claims arising under international agreements such as the 1977 Agreement are arbitrable pursuant to a broad arbitration clause. Pet. A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opinion and Order

85 Civ. 3765 (JFK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION, LTD.,

Petitioner,

—against—

MECHANISED CONSTRUCTION OF PAKISTAN LTD.,

Respondent.

APPEARANCES:

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JOHN F. KEENAN, *United States District Judge*:

Petitioner, ACME seeks to have a foreign arbitration award confirmed. ACME is a Cayman Islands corporation with an office in Westchester County. At the time of the relevant

activities, the office was in Tarrytown. MCP is a wholly-owned enterprise of the government of Pakistan. On January 6, 1977, the parties entered into a contract, the terms of which provided for ACME to supply MCP with goods and services to be used for MCP's construction project in Iraq. The contract was entered into in Lahore, Pakistan. In the petition to confirm, the motion to dismiss and the opposition papers, no party disputed that the contract provided for arbitration in either Paris or Geneva, as set forth in ¶ 9 of the 1977 agreement. (First Bellsey Aff., ¶ 4). However, MCP, in its reply papers, states that in January 1981, sixteen months before the arbitration award was issued by the arbitrator in Geneva, a Pakistani court issued a declaratory judgment to the effect that the arbitration clause contained in ¶ 9 of the agreement was "invalid and ineffective." (Reply Memo, p. 8; Declaratory Judgment ¶ 7, Ex. 3 to Second Bellsey Aff.).

Although the 1977 agreement was modified and superseded in 1978, MCP itself says that the second contract is "not at this juncture relevant to the instant proceedings." (First Bellsey Aff., ¶ 5). After a breach of contract, the parties went to arbitration in Geneva. On May 24, 1982 a final, allegedly binding decision was rendered, awarding ACME $1,402,924 plus 17% interest calculated from "22nd December . . . until payment, and arbitration costs. (Award, ¶ 31, Ex. C to First Bellsey Aff.).

ACME brought this petition to confirm the award in the Southern District of New York. MCP moves to dismiss the petition on three grounds.

1. *Lack of subject matter jurisdiction*: MCP is the instrumentality of a foreign sovereign as defined by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. MCP argues that under the FSIA it is only subject to suit in this country if one of the exceptions to the general grant of immunity applies to it. MCP asserts that none of the exceptions apply. ACME argues that two of the exceptions apply, namely, that which provides for jurisdiction when the foreign sovereign or instrumentality thereof has "waived" its immu-

nity, § 1605(a)(1), done herein, ACME asserts, by MCP's submitting to foreign arbitration in the first place. The other exception alleged to apply pertains to "commercial activity" by the foreign instrumentality. ACME asserts that MCP engaged in commercial activity by visiting New York for negotiations in the summer of 1977 (Raymond Aff., ¶ 6); remaining in New York for up to six months and using the ACME office in New York for negotiations with suppliers (Raymond Aff., ¶ 7); using ACME's New York address as its own for advertising purposes (Raymond Aff., ¶ 4); soliciting bids in the New York Times on March 3, 4 and 7, 1977 (Raymond Aff., ¶ 5); effecting payments by use of letters of credit issued from New York branches of Pakistani banks, worth $30,000,000 (Raymond Aff., ¶ 8); using United States mail, phone and telegraph for the purpose of communicating with its United States agent, ACME (Raymond Aff., ¶¶ 3 and 9).

MCP also argues that Pakistan has never ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"), and therefore cannot be made party to an action falling under the Convention. The district court has original jurisdiction over actions or proceedings arising under the Convention pursuant to 9 U.S.C. § 203, which MCP asserts cannot be exercised with respect to it, a non-ratifying instrumentality. ACME, on the other hand, asserts that the terms of the Convention state that jurisdiction shall lie when the arbitral award is made in the "territory of a State other than the State where the recognition and enforcement" is sought, Convention, Article I. Sections 203 and 207 of Title 9 providing for jurisdiction and power to issue confirmation awards implement the Convention, including the language of Article I. ACME argues that since the situs of the award was Switzerland, and Switzerland is a signatory to the Convention, the award may be enforced in the United States regardless of whether Pakistan is a signatory to the Convention. MCP points out that each of these cases involved non-signatory plaintiffs seeking to confirm awards pursuant to the Convention, as opposed to the instant case, in which the defendant against whom confirmation is sought is the non-

signatory. Thus, MCP argues that the Convention was used "offensively," not "defensively."

2. *Lack of venue*: MCP asserts that venue does not lie in the Southern District of New York.

ACME asserts venue is proper under the Convention, which allows a petition to confirm to be brought in a federal district court where, *absent* arbitration proceedings, a civil action between the parties could be brought. 9 U.S.C. § 204. ACME argues that an action could have been instituted in the Southern District of New York because a substantial part of the events giving rise to the claim, including MCP's failure to pay, arose in New York.

Moreover, ACME argues that venue is proper here under the venue provision of 28 U.S.C. § 1391(f)(3), which sets forth venue criteria for suits against non-immune foreign sovereigns or their instrumentalities, as defined in the FSIA. This section states that venue will lie in any district where the agent or instrumentality is "licensed to do business or is doing business." MCP says that first, it is immune, as discussed above, and second, that it is not licensed to do business nor doing business in the Southern District of New York. It also asserts that no action could have been brought against it under the Convention, as described in the proceeding section, because MCP is not subject to personal jurisdiction here.

3. *Lack of personal jurisdiction*: MCP asserts that due to lack of "minimum contacts" with this district, it is not subject to personal jurisdiction in the Southern District of New York.

DISCUSSION

1. Subject Matter Jurisdiction

A. *Is MCP immune from suit under FSIA?*

The FSIA indeed would cause MCP to be immune from suit, unless one of five statutory exceptions to immunity is deemed applicable. Two of the five appear relevant.

28 U.S.C. § 1605(a) states, "a foreign state shall not be immune from the jurisdiction of [United States courts] in any

case . . . (1) in which the foreign state has waived its immunity either explicitly or by implication . . . . "ACME argues that since MCP entered into the arbitration proceedings in Geneva to the extent of filing a counterclaim, attending a pre-arbitral hearing, and signing the International Chamber of Commerce "terms of reference" (Petition to Confirm, ¶ 11), even though it did not appear at the arbitration, it waived its immunity by participating in foreign arbitration.

MCP argues in its reply papers that it had received a declaratory judgment from a Pakistani court 16 months before the Geneva arbitration took place, which stated that the arbitration clause in the 1977 agreement was invalid. Having read the arbitrator's award (Ex. 3 to Second Bellsey Aff.), it appears that the declaratory judgment obtained in Pakistan was gravely suspect. It arose when MCP brought an action against ACME and the arbitrator himself almost a year after MCP confirmed acceptance of the arbitration clause, and agreed to appointment of a sole arbitrator both in its answer to the request for arbitration and in a letter dated February 11, 1980. The authorized attorney for MCP also signed the "terms of reference" on March 19, 1980. The arbitrator noted, too, that MCP filed a cursory counterclaim in its June 24, 1979 reply to the request for arbitration. (Award, ¶ 17). The declaratory judgment issued on January 13, 1981, though neither defendant had appeared in the case. In fact, the arbitrator states that he was not informed of the decision until March of 1981, well after the decision issued. (Award, ¶ 6).*

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* While the substantive question of the validity of the arbitration clause is not actually before the court at this time, it is significant that the arbitrator's award thoroughly analyzes and criticizes the substantive analysis in the declaratory judgment. According to the arbitrator, MCP's documents supporting the petition before the Pakistani court were "extremely misleading", in that they did not disclose the true state of Pakistani law, and failed to state that MCP had confirmed acceptance of the arbitration clause as detailed above. The arbitrator further noted that the 1978 agreement, which MCP asserts is "not relevant" on this motion, contained a provision stating that the law of Pakistan should govern the parties. The arbitrator cited to Pakistani case and statutory law before determining that the governing law

The declaratory judgment of the court in Pakistan was severely criticized, and eventually discounted by the arbitrator. This Court determines that by engaging in most aspects of the arbitration, MCP waived its right to immunity under the FSIA. As stated in *Ipitrade International* v. *Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978):

> The legislative history of [§ 1605(a)(1)] expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. H. Rep. No. 94-1487, 94th Cong. 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News, at 6604, 6617 . . . . This waiver cannot be revoked by a unilateral withdrawal.

Ipitrade at 826.

Even if waiver did not occur, ACME falls back on a second subsection of the FSIA, which provides for jurisdiction despite the general grant of immunity when "the action is based upon a commercial activity" carried on in the United States by the foreign state." § 1605(a)(2). In *Ministry of Supply, Cairo* v. *Universe Tankships*, 708 F.2d 80 (2d Cir. 1983), the Court of Appeals for the Second Circuit found that the first clause of § 1605(a)(2) "withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' or 'particular commercial transaction' 'having substantial contact with the United States." *Ministry of Supply* at 84. Similarly, it has been held that in the case where the actual commercial activity consisted of negotiation and ultimate formation of a contract in the United States, some part of which contract was to be performed in the United States, the first clause of

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clause could not be controlling, in that the 1978 agreement was wholly coerced under threat of "financial ruin" to ACME, and without new consideration to support the new contract having been offered. (Award, ¶¶ 22-26). The arbitrator also determined that even if the law of Pakistan had applied, the arbitrator still would have had jurisdiction over the dispute. (Award, ¶¶ 8-12).

§ 1605(a)(2) applied, and no immunity existed. *Gibbons* v. *Udaras na Gaeltachta*, 549 F. Supp. 1094, 1111 (S.D.N.Y. 1982). All of ACME's duties under the contract were to be performed in the United States. Much of the contract was negotiated in this country, according to ACME's statement of the facts, which, in the context of this motion to dismiss, is to be granted great weight. Thus, under the holdings of *Ministry of Supply* and *Gibbons*, MCP engaged in "commercial activity" in the United States which lifted the veil of immunity provided by the FSIA. § 1605(a)(1) and § 1605(a)(2) both create exceptions from the general immunity which would otherwise apply to MCP.

B. *Is MCP subject to suit under the Convention?*

The language of Article I of the Convention provides in relevant part:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.

Arbitration panels sitting in the territory of members states have repeatedly had their awards confirmed, even when one of the parties to the arbitration has not ratified the Convention. In *La Societe Nationale Pour La Recherce* v. *Shaheen Natural Resources*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd* 733 F.2d 260 (2d Cir.), *cert. denied*, 105 S.Ct. 251 (1984), the district court rejected the argument that the Convention was inapplicable to a citizen of a country which had not ratified the Convention, stating:

> [this] reasoning is inconsistent with the unambiguous language of the Convention which provides that the Convention applies to arbitral awards made in the "territory of a state other than the State where the recognition and enforcement of such awards are sought." Convention, Article 1, 9 U.S.C. § 201. *The focus of this article to the Convention is not on the nationality of the party*

seeking to enforce the award but on the situs of the arbitration.

La Societe at 64, emphasis added.

Similarly, in *Jugometal* v. *Samincorp, Inc.*, 78 F.R.D. 504 (S.D.N.Y. 1978), a foreign arbitration award was confirmed even though Yugoslavia was not a party to the Convention. The country where the arbitration had taken place, France, had ratified the Convention, and the court determined that subject matter jurisdiction to "recognize and enforce" the arbitration award therefore existed. *Jugometal* at 506.

MCP argues that in *La Societe* and *Jugometal*, as well as in other cases cited by plaintiff, non-ratifying plaintiffs were allowed to use the Convention offensively. MCP distinguishes its own case on the grounds that here it is the defendant which is a non-ratifying instrumentality, yet which is being subjected to enforcement of the Convention. MCP cites no cases which support its argument that the provision of § 201 as interpreted by Judge Duffy of this court in *La Societe* should not apply in this defensive situation. Precedent as well as the language of the statute and common sense dictate that the focus of the inquiry is the situs of the country in which arbitration took place, and its accession to the Convention. Whether it is plaintiff or defendant who seeks to invoke the situs rule is irrelevant to the inquiry. This Court has subject matter jurisdiction to confirm the petition.

2. Venue

A. *Is venue proper under the Convention?*

9 U.S.C. § 204 provides for venue over cases involving the Convention in two possible types of districts. Of these two, one applies to the instant case. Under § 204, venue exists in any federal district court "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought."

MCP asserts that it could not have been sued in the Southern District of New York absent arbitration proceedings, because it

is immune from suit under the FSIA, and because it does not have the requisite "minimum contacts" with this district such as would allow for personal jurisdiction over it in the Southern Dis[t]rict. As pointed out above, MCP has waived its right to immunity by participating in the arbitration in Geneva, and could be sued in this district if it has the appropriate contacts. The question of minimum contacts is discussed in section 3, below.

B. *Is venue proper under the statute providing for venue generally in civil actions against a foreign state?*

28 U.S.C. § 1391(f)(1) states that venue in civil actions against a foreign state exists "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurs . . . ." ACME alleges that a substantial part of the claim arose here, including MCP's failure to pay as contracted in the 1977 agreement. On this motion to dismiss, the court must of course give credence to plaintiff's statement of the facts. Given all the factors described in the context of the discussion on "commercial activity," see pp. 3, 4 and 9, *supra*, it is evident that the acts of negotiation, issuance of letters of credit, performance of procurement and solicitation of bids took place in the Southern District of New York. These acts, as well as non-payment, constitute a "substantial part" of the events giving rise to the claim, so as to create venue under § 1391(f)(1).

Venue is thus appropriate in the Southern District of New York, under 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(1).

3. Personal Jurisdiction

MCP argues that the constitutionally required "minimum contacts" do not exist in this case such as to enable this Court to exercise personal jurisdiction over the defendant. As a preliminary matter, it is not clear that "contacts" between the United States and the defendant are required where the judgment sought is simply the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity

to appear and contest the entry of judgment, as was the case here. The seminal case of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) may have some bearing on this matter. The Court observes that the *Shaffer* decision hinged on the jurisdictional issue of property within the district, and concerned the enforceability of a domestic state judgment, and may not be applicable to the other forms of "minimum contacts" or to enforcement of an arbitral award based on treaty. Given the fact that *Shaffer* is potentially distinguishable, the Court will proceed with the personal jurisdiction analysis. Nevertheless, the Court notes that the *Shaffer* Court stated:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

Shaffer at 210-11, n.36.

MCP asserts that it did not enter into the 1977 contract in the United States, or in this district, did not use the United States mails, phones or telegraph in forming the contract, and in general, does not have the requisite contacts with the district to sustain personal jurisdiction. ACME argues that MCP's chief executives used ACME's New York offices as their base of operations in connection with supervising ACME, MCP listed ACME's New York address as one of its overseas offices in an advertising brochure, established letters of credit in New York and effected payment through New York bank branches of Pakistani banks, and used United States phone and mails to communicate with its United States Agent, ACME.

These facts, discussed in the sections pertaining to subject matter jurisdiction and venue, *supra*, pp. 6-13, are relevant on the issue of personal jurisdiction. The Court concludes that MCP had a continuous and systematic presence in this district, and could have foreseen that it might be sued in this district. *See International Shoe Co.* v. *State of Washington*, 326 U.S.

310 (1945). Particularly with respect to the affiliation with ACME through a relationship comparable to, if not actually that of principal and agent, and use of the New York address of ACME for its own purposes, MCP has established contacts with the Southern District of New York well above the minimum required to support this Court's exercise of personal jurisdiction over MCP. *See Hanson* v. *Denckla*, 357 U.S. 235 (1958).

CONCLUSION

All three bases for MCP's assertion that this Court has no jurisdiction over it, and that venue is improper in this district, are without merit. The motion to dismiss is denied on all grounds. Defendant MCP is directed to file and serve its answer within 30 days of the date of this opinion and order. The parties shall appear for a status conference on April 22, 1986 at 4:00 p.m. in Courtroom 35 of the United States Courthouse, 40 Foley Square, New York City.

SO ORDERED.

Dated: New York, New York
February 28, 1986

/s/ JOHN F. KEENAN
John F. Keenan
U.S.D.J.

Judgment

85 Civ. 3765 (JFK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT CORPORATION LTD.,

Petitioner,

—v.—

MECHANISED CONSTRUCTION OF PAKISTAN, LTD.,

Respondent.

WHEREFORE Petitioner American Construction Machinery & Equipment Corporation Ltd. having commenced this action on May 17, 1985 to confirm pursuant to 9 U.S.C. § 207 the foreign arbitral award rendered on May 24, 1982 under the rules of the International Chamber of Commerce against Respondent Mechanised Construction of Pakistan Ltd. (the "Award"); and Petitioner having moved this Court to confirm said Award and to request the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure upon Respondent; and the Court having by Opinion and Order dated March 23, 1987 confirmed the Award which directed Respondent to pay Petitioner: (a) $1,402,924.00 including interest up to December 21, 1981; (b) interest at the rate of 17% on that sum from December 22, 1981 until the date of payment; (c) arbitration costs of $45,057.57; and (d) Petitioner's legal costs calculated at $87,500.00; and the Court having further denied Petitioner's request for Rule 11 sanctions; and the Court having ordered that judgment shall so be entered, it is hereby

ORDERED, ADJUDGED AND DECREED that the Award is confirmed pursuant to 9 U.S.C. § 207 and that Petitioner have judgment against Respondent in the liquidated amount of $1,402,924.00, with interest at the rate of 17% from December 22, 1981 amounting to $1,258,480.82 as of April 1, 1987, plus arbitration costs in the amount of $45,057.57 and legal costs in the amount of $87,500.00, amounting in all as of April 1, 1987 to $2,793,962.39; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner's request for imposition of Rule 11 sanctions is denied.

Dated: New York, New York
April 6, 1987

/s/ JOHN F. KEENAN
U.S.D.J.